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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 590

THE UNITED STATES, PETITIONER

v.

SAFEWAY STORES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on December 5, 1950.

OPINION BELOW

The opinion of the Court of Claims (R. 28-40) is reported at 93 Fed. Supp. 900.

JURISDICTION

The judgment of the Court of Claims was entered on December 5, 1950 (R. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether respondent's deliveries of meat in accordance with Food Distribution Orders 28, 75 and 75-2, requiring federally licensed meat slaughterers to set aside and hold for delivery to the Government and to authorized purchasers prescribed percentages of their slaughter, constituted a taking of respondent's property for which the United States must pay just compensation under the Fifth Amendment.

2. Whether, assuming there was such a taking, the denial to respondent of a special subsidy for the meat so delivered, to which subsidy respondent was ineligible under applicable regulations, constituted an "exceptional circumstance," entitling respondent to compensation measured by the applicable wholesale meat ceiling price plus the special subsidy.

REGULATIONS INVOLVED

The provisions of Food Distribution Order No. 28 (8 Fed. Reg. 2787), of Food Distribution Order No. 75 (8 Fed. Reg. 11119) as originally issued, and of Food Distribution Order No. 75-2, as amended by Amendment 2 (8 Fed. Reg. 11325, 12504), relating to the set-aside requirements, are set out in Appendix A, *infra*, pp. 29-40.[1] The provisions of Amendment 2 to Regulation 3 of Defense Supplies Corporation Livestock Slaughter Pay-

[1] The several amendments to Food Distribution Order No. 75 and No. 75-2, issued during the period here involved, do not materially change the provisions reproduced and are omitted in order to avoid possible confusion.

ments, relating to the special 80 cent per hundredweight subsidy, is set out in Appendix B, *infra*, pp. 41-44.

STATEMENT

This is a suit for just compensation under the Fifth Amendment for an alleged taking of meat which respondent delivered, during the period from July 3, 1943 to July 30, 1945, to the Government or to authorized purchasers in accordance with certain "set-aside" orders issued by the Secretary of Agriculture and the War Food Administrator (R. 1-27). The Court of Claims held that respondent's meat had been taken, and that respondent was entitled to receive, as just compensation therefor, the wholesale meat ceiling price in effect at the time of the deliveries plus the amount of a special 80 cent per cwt. subsidy, which the court held respondent had been erroneously denied (R. 35-39). The facts, as they appear in the findings of the Court of Claims, the transcript of evidence, and the official records, may be summarized as follows:

1. Respondent is, and was throughout the period here involved, an integrated food chain store organization comprising some 2,300 retail food stores and facilities for the production, manufacture, and processing of food products (R. 28). Prior to the imposition of wartime controls in the meat industry, respondent did not own or operate any slaughtering facilities but purchased carcass beef from

established slaughterers (R. 28, 72). In connection with the operation of its retail stores during World War II, respondent found itself faced with an acute meat shortage, particularly on the East and West Coast (R. 28, 73). In order to supply beef to its retail markets in Washington, D. C., and New York (R. 29, 73), respondent purchased all the stock of the Nebraska Beef Company, a slaughtering plant located at Omaha, Nebraska, all of the assets of which were transferred to respondent on July 3, 1943 (R. 28, 29).[2] Thereafter, respondent applied for federal inspection of the plant under the Federal Meat Inspection Act[3] (R. 204), and efficiently operated it as a federally inspected plant, engaged solely in the production of carcass beef as a non-processing slaughterer (R. 29, 107, 109).

2. During the war years, it was necessary to control, regulate, and allocate the production and consumption of food and food products. As the national emergency became more acute, the controls initially instituted were extended and made more stringent and eventually resulted in the exercise of full regulation of the production, supply, and consumption of scarce food supplies. To meet the critical problem presented by the short supply

[2] This plant, which was operated as Nebraska Beef Company division of respondent, was the first of nine slaughtering plants acquired and operated by respondent during the period of wartime restrictions.

[3] Under the Federal Meat Inspection Act of 1907 (34 Stat. 1260, 21 U.S.C. 71 *et seq.*), federal inspection of beef carcasses is required as a prerequisite to moving them, or the meat produced therefrom, in interstate commerce.

of meat compared with the existing demand, as well as to assure that the available supply would be distributed properly, rigid controls had been instituted over all aspects of the slaughtering industry, except the purchase of livestock,[4] when respondent acquired Nebraska Beef in July 1943 (R. 28-29).[5] By that time, all slaughterers were required to register, and subsequently to obtain a license or permit, before they were permitted to slaughter, and, in addition, they were subjected to strict quota limitations and other restrictions on slaughter as well as on the sale of all meat produced (R. 29-30, 87-95).

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[4] Indirect control was exercised over livestock prices through the meat subsidy program. See *infra*, pp. 9-10. Direct control of livestock prices was ultimately initiated by Maximum Price Regulation 574, effective January 29, 1945. 10 Fed. Reg. 1270.

[5] Controls over the slaughtering industry were originally imposed and administered by the Office of Price Administration under Meat Restriction Order No. 1, effective October 1, 1942 (7 Fed. Reg. 7839, 8 Fed. Reg. 3201) and issued pursuant to War Production Board directives authorized by Executive Order 9024 (7 Fed. Reg. 329). The President transferred authority over the food program to the Secretary of Agriculture in December 1942 (Executive Order No. 9280, 7 Fed. Reg. 10179), and to the War Food Administrator in April 1943 (Executive Order 9322, 8 Fed. Reg. 3807; Executive Order 9334, 8 Fed. Reg. 5423). Prior to respondent's entry into the slaughtering business in July 1943, Meat Restriction Order No. 1 was superseded and the controls embodied therein were continued and expanded by War Food and Food Distribution Orders 26, 27, 28 and 61 (8 Fed. Reg. 2784, 2785, 2787, 9108). Those orders were replaced in August 1943 by comprehensive control orders designated Food Distribution Orders 75, 75-1, 75-2 (8 Fed. Reg. 11119, 11327, 11325), which, as amended at various times, governed the slaughter, production, sale, delivery and disposal of meat throughout the remainder of the period here involved.

In an effort to ensure an adequate flow of meat to the armed forces and our allies, Food Distribution Order 28 (8 Fed. Reg. 2787), and subsequently Food Distribution Orders 75, 75-2 (8 Fed. Reg. 11119, 11325), required all federally inspected slaughterers, of which respondent was one, to set-aside percentages [6] of their production of carcass beef, for sale to specified government agencies and to authorized purchasers who held contracts to supply the Army (R. 30, 88, 90, 92). Appendix A, *infra,* pp. 29-40. Quantities sold and delivered to authorized purchasers were credited under certificates stating the quantities delivered and the number of the contract with the Army (R. 30, 54). Appendix A, *infra,* pp. 31, 39. The set-aside orders, in addition to making provision for relief on account of hardship, provided that the War Food Administrator could revoke or suspend licenses to slaughter for failure to comply, and further could prohibit violators from dealing with meat or any other materials subject to allocation control (R. 30, 95). Appendix A, *infra,* pp. 34, 37. Wilful violators were subject to applicable civil or criminal laws (R. 30). Appendix, *infra,* pp. 34, 37.

Throughout the period here involved (July 3,

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[6] Initially forty percent of the beef carcasses which met Army specifications was required to be set-aside. Subsequently, the percentages differed with the grade of meat; on the three top qualities of beef which respondent produced, the set-aside requirements fluctuated between thirty and sixty percent.

1943—July 30, 1945), respondent's Nebraska Beef was subject to these set-aside orders and delivered meat in accordance therewith. The usual procedure was for respondent, upon ascertaining the quantity of set-aside beef available in a given week, to call a known purchasing agent for the Government and request that he issue a purchase order and delivery instructions to cover the available meat (R. 49, 68, 83).[7] A purchase order was then issued, and after delivery respondent forwarded an invoice for reimbursement at the wholesale ceiling price (R. 49, 68, 83). Sales and deliveries to the two concerns (Finer Foods Co. of Chicago, Illinois and Ohio Packing Co. of Athens, Ohio) to which respondent sold meat for boning,[8] were

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[7] The purchase orders provided for Army veterinary inspection for type, class, and grade at point of origin. According to the findings below, the set-aside orders permitting slaughterers to take credit on set-aside reports for beef delivered to commercial boners also provided that such credit was conditioned upon Army veterinary inspection before shipment. The Army veterinary inspectors stationed at the Nebraska Beef plant selected the carcasses to fill the set-aside orders, and stamped these carcasses with an Army stamp. This selection was for the purpose of ascertaining whether the carcasses met the requirements of Army specifications and the stamp indicated that the carcasses had been inspected and accepted. Inspection at destination was then necessary only for quantity and condition (R. 48-49).

[8] In September 1943, a portion of the meat set-aside was required to be in the form of boneless beef. Amendment 2 to F.D.R. 75-2, Appendix A, *infra*, p. 37. Nebraska Beef, however, had no boning facilities and hence was unable to comply. A Compulsory Order, invoking Section 9 of the Selective Service and Training Act of 1940 (54 Stat. 892, 50 U.S.C. App. 309) and requiring respondent to deliver 135,000 pounds of boneless beef, was placed with respondent. Respondent, however, did not comply with this Order and no claim is here

handled by direct business arrangements between respondent and those concerns; invoices and payments were handled on customary commercial terms (R. 67, 68, 83). No contract existed between the Government and respondent for any products sold to the boning concerns (R. 68).

Respondent sold and delivered to the Government, or to authorized purchasers, only beef for which it received purchase orders (R. 70). Where purchase orders were not received from the Government, or authorized purchasers, covering the weekly percentages required to be set-aside, this meat, together with that not covered by the set-aside orders, was delivered to respondent's retail stores (R. 33). All meat, whether sold to the Government, to the boning companies, or delivered to respondent's retail stores was invoiced at maximum wholesale price applicable at Omaha, Nebraska, in accordance with Revised Maximum Price Regulation No. 169 (8 Fed. Reg. 4097) (R. 66-67).[9]

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asserted based on that order. See *infra*, pp. 18-19, fn. 16. Nor did respondent comply with the set-aside requirements as to boneless beef until it sold carcass beef to the boning companies referred to in the text, beginning in May 1944 (R. 53-54, 86). The boning companies issued appropriate certificates to respondent, on the basis of which respondent credited the meat sold to these companies against its set-aside requirements (R. 54, 56). *Supra*, p. 6.

[9] From December 27, 1943, to May 3, 1944, respondent stamped the invoices which it prepared and submitted to the Government for payment of beef products at maximum wholesale ceiling prices with the notation (R. 227):

> Buyer acknowledges that the prices set out in this invoice for fresh beef are tentative only and that all such

3. As a further part of the comprehensive meat control program, there was in effect during the period here involved a system of subsidies to slaughterers, administered in accordance with Livestock Slaughter Payments Regulation No. 3 of the Defense Supplies Corporation (8 Fed. Reg. 10826). This subsidy program was instituted in an effort to keep uncontrolled livestock prices within a predetermined range and in part to compensate slaughterers for the disadvantages of distributing in a controlled market (R. 29). Under this regulation, subsidies were payable only to slaughterers who held valid licenses to slaughter and who were in compliance with wartime meat regulations of the War Food Administrator and Office of Price Administration. Livestock Slaughter Payments Regulation No. 3, *supra*, Sections 2, 10(a). Violation of any of these regulations made the slaughterers' right to this subsidy subject to for-

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merchandise is purchased at the highest price permitted by law. In the event of change in the price regulations or in the event the courts rule that the said regulations do not comply with the law, buyer agrees to pay seller any additional amounts required in order to allow seller a fair and equitable margin for processing the merchandise as provided for in Section 3 of the October 2, 1942 Amendment to the Emergency Price Control Act of 1942.

Because some purchasing agencies refused payment on the stamped invoices and requested their resubmission without the stamp, respondent removed the stamp from its invoices, and on May 3, 1944, notified the Quartermaster Market that, although it was removing the stamp, it reserved its rights to recover amounts in excess of the invoice price if permitted by a change in the price regulations or court decisions. (R. 75, 227.)

feiture (R. 100). In addition, Amendment 2 to Regulation No. 3 (9 Fed. Reg. 1820, 32 C.F.R., 1944 Supp., § 7003.14), effective November 1, 1943, provided for the payment of a special subsidy of 80 cents per hundred weight to "nonprocessing slaughterers," as defined in that Amendment (R. 33, 34).[10] Appendix B, *infra*, pp. 41-42. Respondent's application for that subsidy was denied by the Defense Supplies Corporation because respondent, having retail meat outlets, was not within the Amendment's definition of non-processing slaughterer. (R. 189,-192).

4. The Court of Claims found that respondent delivered 23,790,296 pounds of beef pursuant to the set-aside orders, for which it was paid, in accordance with the applicable wholesale ceiling price, the total sum of $4,509,946.72 (R. 31, 33). The cost of live cattle, together with the slaughtering costs, totalled $5,544,681.00, after applying certain credits for by-products to the slaughtering expense, with the result, the court found, that costs exceeded receipts by $1,034,734.28 (R. 33). This loss, the court also found, was partially offset by $543,-321.32, the portion of the basic slaughterer's subsidy received by respondent (in the amount of $1,110,626.62) which should be allocated to set-aside beef, thereby reducing the loss to $491,412.96. This loss was further reduced to $459,856.72, by the

[10] This special subsidy was inaugurated pursuant to Office of Economic Stabilization Directive of October 25, 1943 (8 Fed. Reg. 14641).

crediting of $31,556.24 in profits realized by respondent from the sale of certain by-products at its retail stores (R. 33).

Had respondent received the 80-cent special subsidy (*supra,* p. 10), the Court of Claims found it would have received an additional sum of $276,414.80 (R. 34), but had it received the 80-cent special subsidy it would not have received another special subsidy of 50 cents per hundredweight which it applied for and received during the period from May 1 to June 4, 1945 (R. 34). Of the total $14,391.77 received under this latter subsidy plan, approximately 60 percent or $8,635.06, was allocable to the set-aside meat (R. 34).

The Court of Claims held that respondent was "under compulsion" to deliver meat in accordance with the set-aside orders and so was entitled to compensation under the Fifth Amendment (R. 36). As to the amount of compensation, the court held that the proper measure was the wholesale ceiling price, rather than the retail ceiling price, as respondent claimed (R. 37). The court went on to hold, however, that since respondent had been unable to recoup its losses on the set-aside meat, it had been "erroneously denied" the 80-cent special subsidy, and that denial constituted an exceptional circumstance, which, under the rule of *United States* v. *Commodities Trading Corp.,* 339 U.S. 121, entitled respondent to compensation

measured by the wholesale ceiling price plus the 80-cent special subsidy. The court accordingly entered judgment for the amount of that subsidy which, as adjusted, aggregated $267,729.24 (R. 41).[11] Judge Madden dissented (R. 39). Chief Judge Jones took no part in the decision (R. 40).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that the delivery to authorized purchasers or to the Government of meat set-aside therefor, in accordance with valid regulations of the War Food Administration, resulted in a taking of property under the Fifth Amendment.

(2) In failing to hold that the maximum ceiling price for the meat in effect at the time of the claimed taking was the proper standard of just compensation therefor.

(3) In holding that the just compensation for such a taking was measured by the maximum ceiling price therefor in effect at the time plus a special 80-cent subsidy to which the respondent was not entitled under valid regulations of the Defense Supplies Corporation.

(4) In holding that respondent was erroneously denied the special 80-cent subsidy.

(5) In holding in effect that it had jurisdiction

[11] The court deducted from this subsidy the amount of the 50-cent special subsidy which respondent would not have received had it received the 80-cent subsidy. See *supra*, p. 11.

to grant and allow this special 80-cent subsidy.

(6) In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

In 1943, respondent, anxious to obtain a supply of meat for its retail stores, applied for and received a license to enter the meat slaughtering business as a federally inspected slaughterer. Due to the critical shortage of meat at that time, the meat industry was subject to a comprehensive scheme of government regulations, including a requirement that each federally inspected slaughterer set-aside a percentage of its slaughter for delivery to the Government or authorized purchasers. Respondent complied with these requirements and was consequently permitted to engage in slaughtering operations all during the period of these controls, and received a substantial basic slaughterer's subsidy. Notwithstanding these benefits, respondent seeks in the instant case to recover additional compensation for the set-aside meat. The Court of Claims sustained respondent's position, in large measure, by holding (1) that these deliveries of meat resulted in a Fifth Amendment taking, and (2) that denial to respondent of a special 80-cent subsidy constituted an exceptional circumstance, justifying an award of compensation measured by the applicable ceiling price plus the amount of the special subsidy.

In so holding, the Court of Claims made erroneous rulings on questions which have both present

and potential importance. A substantial number of actions, still pending against the United States, raise the same or similar issues, particularly as to the meaning of "special conditions and hardships," which this Court, in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 128, held would support an award in excess of applicable ceiling prices as just compensation. In addition, definitive rulings on these questions will have substantial bearing on the methods used in mobilizing national resources and in controlling the nation's economy in the defense effort upon which we are now embarked.

1. The Government's requirement that respondent set aside for delivery to it, or to authorized purchasers, a percentage of the meat which respondent slaughtered did not involve a "taking" as the court below held (R. 36), but rather constituted a valid exercise of the war power to allocate scarce commodities among the competing demands of the armed forces, our allies, and the home front.

(a) Food Distribution Order 28, and its successor, Food Distribution Order 75-2, the set-aside orders here involved, were issued after it became apparent that the then-existing quota system for the slaughtering and distribution of meat for civilian consumption (Meat Restriction Order No. 1, 7 Fed. Reg. 7839, 8 Fed. Reg. 3201) had failed to channel sufficient quantities of meat to war and

governmental users.[12] See *e.g., United States* v. *Felin & Co.,* 334 U. S. 624, 626-627. The orders required that a prescribed percentage of the slaughter be reserved for sale to governmental agencies or to authorized processors (who would then supply the Government. F. D. O. 28, Section 1410.2(b); F. D. O. 75, Section 1410.15 (m); F. D. O. 75-2, Section 1410.18, *infra,* pp. 29, 35, 37. For the meat so delivered the slaughterers received the same maximum price that they would have received had they sold the meat for civilian consumption at wholesale (R. 66).

Thus, the orders were intended merely to divert a larger portion of the available meat to what was deemed to be a more urgent need. This purpose is manifest from the preamble of F. D. O. 28, which states that it was issued "to assure an adequate supply and efficient distribution of meat to meet war and essential civilian needs," and was in full accord with the Executive Orders and statutory authority pursuant to which the set-aside orders were issued. By Executive Order 9280 (7 Fed. Reg. 10179),[13] the President directed the Sec-

[12] The quota system authorized a slaughterer to process a prescribed percentage of his historical slaughter. Section 1407.912 of Meat Restriction Order No. 1 classified certain agencies of the Government, including the Army, Navy, Marine Corps and Coast Guard, as "exempt purchasers" and sales to them were not chargeable against a slaughterer's quota.

[13] Executive Order 9322 (8 Fed. Reg. 3807) and Order 9334 (8 Fed. Reg. 5423), authorized the War Food Administrator to exercise the power over food vested in the Secretary of Agriculture by Executive Order 9280. See *supra,* p. 5, fn. 5.

retary of Agriculture and the War Food Administrator to "make allocations of food for human and animal consumption to governmental agencies and for private account, for direct and indirect military, other governmental, civilian, and foreign needs" (par. 1(c)), and delegated to them the authority vested in him by Section 2(a) of the Second War Powers Act (54 Stat. 676, as amended by 56 Stat. 177, 50 U. S. C. App. 633) to "allocate" foods in short supply (par. 8(b)).

Clearly, therefore, the set-aside orders involved an exercise of the allocation power approved by this Court in *Stewart & Bro.* v. *Bowles,* 322 U. S. 398, as an appropriate regulatory device for "getting the right [food] to our armed forces in time." 322 U. S. at 405; see also, pp. 404-406; cf. *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815. As allocation measures, the orders were fully embraced within the war power, which has been described as "an effective power to wage the war successfully" (*Lichter* v. *United States,* 334 U. S. 742, 782), and which has already been held to provide the foundation for the Government's right, among other things, to control the price of every commodity bought or sold within the national boundaries (*Yakus* v. *United States,* 321 U. S. 414); to fix the amount of rent to be charged every room, home or building (*Bowles* v. *Willingham,* 321 U. S. 503; *Woods* v. *Miller Co.,* 333 U. S. 138; *United States* v. *Shore-*

line Cooperative Apartments, Inc., 338 U. S. 897); and to recapture excessive profits on war contracts (*Lichter* v. *United States*, 334 U. S. 742; cf. *Coffman* v. *Federal Laboratories*, 171 F. 2d 94 (C. A. 3), certiorari denied, 336 U. S. 913).[14]

(b) The court below based its conclusion that respondent's meat had been "taken" on the erroneous assumption that, since fines and imprisonment were provided for violations of the set-aside orders,[15] respondent's delivery pursuant thereto was compulsory. This conclusion ignores the fact that compliance with the set-aside orders became mandatory upon respondent only after it had freely decided to engage, and to continue to engage, in activities which brought it within the requirements of these orders.

At no time was respondent required to engage in the slaughtering business. Each slaughterer, including respondent, decided for itself whether

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[14] See, also *Hirabayashi* v. *United States*, 320 U.S. 81; *Falbo* v. *United States*, 320 U.S. 549; *Selective Draft Law Cases*, 245 U.S. 366; *Schenck* v. *United States*, 249 U.S. 47; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146; *Northern Pacific Railway Co.* v. *North Dakota*, 250 U.S. 135.

[15] In passing, it should be noted that the fines up to $50,000 and imprisonment up to three years, referred to by the court below (R. 30, 31), were provided for violation of Compulsory Orders issued under Section 9 of the Selective Training and Service Act of 1940 which, as we point out, *infra*, pp. 18-19, fn. 16, are not the basis of respondent's claim here. Failures to deliver in accordance with set-aside orders were punishable, as specifically noted in F.D.O. No. 28, under Paragraph 5 of Section 301 of Title III of the Second War Powers Act (50 U.S.C. App. 633), which provides for fines of not more than $10,000 or imprisonment for not more than one year or both. Appendix A, *infra*, p. 34.

to go into the slaughtering business, and, indeed, respondent first entered the slaughtering business in July 1943 with full knowledge of the restrictions to which it thereby became subject; the system of meat controls, including the set-aside orders (first promulgated in March 1943), had completely evolved by that date. Nor was there any compulsion on respondent—or any other slaughterer—to remain in the slaughtering business. As far as the Government was concerned, each slaughterer, including respondent, was at all times free to discontinue slaughtering and thereby relieve itself from compliance with the set-aside orders.

Moreover, not only was respondent free, at any time, to go out of the slaughtering business entirely, but so far as the set-aside orders were concerned it was under no obligation to do any slaughtering during any given period of time. Unlike the War Department's letter order of November 8, 1943, placed with the respondent,[16] and the

[16] The War Department letter order of November 8, 1943, served upon respondent because of its failure to comply with the boneless beef requirements of the set-aside orders (see fn. 8, *supra*, p. 7), bore a preference rating and was designated as Compulsory Order No. W-11-027-gm-4959. It invoked Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892, 50 U.S.C. App. 309), called for the delivery of 135,000 pounds of fresh frozen boneless beef during the period of November 15-20, 1943, and stated that compliance therewith was obligatory and should take preference over other orders (R. 216, Pl's Ex. 22; R. 213, Pl's Ex. 21). This order, on its face, left respondent no choice but to perform those things necessary in order to effect compliance. Respondent, however, did not comply with the order, and the Army took no steps to obtain compliance; instead, on January 11, 1944, it urgently requested respondent to cooperate in supplying boneless beef

orders involved in cases such as *Liggett & Myers Co.* v. *United States,* 274 U. S. 215 and *Stahel & Co.* v. *United States,* 111 C. Cls. 682, certiorari denied, 336 U. S. 951—where the governmental order was held to compel the supplying of a commodity, with delivery pursuant to the order resulting in a taking [17]—the set-aside orders did not direct repondent (or any other slaughterer) to deliver any prescribed quantity of meat and hence did not require them to engage in slaughtering operations. On the contrary, the orders merely provided that a percentage of its total slaughter to be set aside, and it was left up to each slaughterer to determine, subject to quota limitations, how much slaughtering to do. If, and only if, a slaughterer decided to, and did in fact, slaughter meat, was it obligated

(R. 226, Pl's Ex. 27). Since respondent did not comply with the Compulsory Order, it has no claim, nor does it in this case assert any, for compensation under that Order or under Section 9 of the Selective Training and Service Act of 1940.

[17] In *Liggett & Myers,* the company, a manufacturer of tobacco products, was notified by the Navy Department that an order was thereby placed to furnish specified tobacco products, that compliance therewith was obligatory, and that no commercial orders should be allowed to interfere with the delivery called for (274 U. S. at 218); these requirements, commanding delivery of the designated merchandise, left the company no choice but to comply and in effect required it to engage in manufacturing operations, if necessary to produce the commandeered products. In the *Stahel* case, the only case cited by the court below in support of its conclusion, the owners of raw silk delivered it to the Defense Supplies Corporation under an order, the acceptance of which was required by the applicable regulations of the Office of Production Management (the predecessor of the War Production Board); there, again, the owner of the silk, having it on hand, had no choice but to deliver his silk to the Defense Supplies Corporation.

to set aside a portion for delivery to the Government.[18]

In these circumstances, the instant case presents a situation closely akin to that under the Emergency Price Control Act (56 Stat. 23, as amended, 50 U.S.C. App. 901 *et seq.*) which authorized the establishing of maximum prices at which virtually all commodities might be sold, and likewise prescribed fines and imprisonment for violations thereof (50 U.S.C. App. 925). In *Bowles* v. *Willingham,* 321 U. S. 503, this Court rejected the contention that the fixing of maximum prices resulted in a "taking" of property, on the express ground that although the ceiling prices reduced the value of the property affected by the Act, "there is no requirement that the [commodities involved] be used for purposes which bring them under the Act" 321 U. S. at 517; see also, *Wilson* v. *Brown,* 137 F. 2d 348, 352-354 (E.C.A.); *E. I. DuPont de Nemours & Co.* v. *Hughes,* 50 F. 2d 821, 825 (C.A. 3). The landlord was free to refuse to rent and the owner of property to refuse to sell.

By the same token, there was no taking of respondent's property, since here, as in *Bowles* v. *Willingham,* there was no requirement that respondent use its property for purposes which

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[18] If respondent did not receive purchase orders from the Government or authorized purchasers for the full amount of the set-aside, it was free to sell the excess to private customers or to make whatever use of the meat it desired. *Supra,* p. 8.

brought it under the government controls involved. Respondent voluntarily decided to enter the slaughtering business and to continue to slaughter meat; by so doing it became subject to the allocations established by the set-aside orders and their concomitant sanctions. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 407. Allocation or priority orders, like orders setting maximum prices, do not constitute takings for which just compensation must be paid. If the set-aside orders had allocated part of respondent's slaughter to specified classes of private purchasers, such as civilian hospitals, respondent would clearly not be able to vindicate a claim to just compensation. It should make no difference that the United States is the beneficiary of the allocation orders, so long as respondent was legally free to refuse to do any slaughtering.

This conclusion is buttressed by the sharp differences between the Compulsory Order (*supra,* pp. 18-19, fn. 16) and the set-aside orders, which, we believe, clearly demonstrate that the Government was seeking by the set-aside orders to obtain for the armed forces the necessary supplies of beef by means short of requisitioning, and thereby to avoid requisitioning if possible. Cf. *Lichter* v. *United States,* 334 U. S. 742, 757; *United States* v. *Felin & Co.,* 334 U. S. 624, 626-627; *American Smelting Co.* v. *United States,* 259 U. S. 75; *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Highland* v. *Russell Car Co.,* 279 U. S. 253.

2. Assuming *arguendo* that the meat delivered pursuant to the set-aside orders was "taken," the court below erred in holding that the just compensation to which respondent was entitled should be measured by the wholesale ceiling price plus the special 80 cent subsidy. While recognizing that under *United States* v. *Felin & Co.*, 334 U. S. 624 and *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, the applicable ceiling price is the normal measure of just compensation in the absence of exceptional circumstances, the Court of Claims found such exceptional circumstances, permitting the greater award, in that respondent had been "erroneously" denied the special 80-cent subsidy. In so holding, the court improperly undertook to pass on the validity of the subsidy regulations—a matter uniformly held to be committed by Section 204(d) of the Emergency Price Control Act (50 U.S.C. App. 924(d)) to the exclusive jurisdiction of the Emergency Court of Appeals. Furthermore, there was no basis for the conclusion that the denial of the subsidy was an "exceptional circumstance" removing the instant case from under the general rule established in the *Commodities Trading* case.

(a) Section 204(d) of the Emergency Price Control Act of 1942 vests in the Emergency Court of Appeals, and in this Court upon review of the Emergency Court's judgments, "exclusive jurisdiction to determine the validity of any regulation

or order issued under section 2 * * * and of any provision of any such regulation, order * * *," and provides that no other court shall have jurisdiction or power "to consider the validity of any such regulation, order * * *." The compelling considerations which motivated that exclusive grant of jurisdiction have been reviewed by this Court, and the constitutionality of the grant affirmed. *Lockerty* v. *Phillips,* 319 U. S. 182; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503.

The Emergency Court of Appeals has this exclusive original jurisdiction, not only as to maximum price regulations, but also as to subsidy regulations such as those relating to the special 80 cent subsidy. These subsidy regulations, and the orders issued under them, have consistently been held to be regulations and orders within the meaning of Section 2(e) of the Emergency Price Control Act,[19] and subject to review only in accordance with the procedures established by that Act.[20] Since the

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[19] *Illinois Packing Co.* v. *Bowles,* 147 F. 2d 554 (E.C.A.); *Illinois Packing Co.* v. *Snyder,* 151 F. 2d 337 (E.C.A.); *Armour & Co.* v. *Reconstruction Finance Corporation,* 162 F. 2d 918, 923 (E.C.A.); *Belle City Packing Co.* v. *Reconstruction Finance Corp.,* 169 F. 2d 413 (E.C.A.); *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation,* 169 F. 2d 419, 420 (E.C.A.), certiorari denied, 335 U. S. 846; *Merchants Packing Company* v. *Reconstruction Finance Corporation,* 176 F. 2d 908 (E.C.A.).

[20] *Swift & Co.* v. *Reconstruction Finance Corporation,* 183 F. 2d 456 (C.A. 7), certiorari denied, 340 U. S. 878; *Tambasco* v. *Reconstruction Finance Corporation,* 178 F. 2d 283, 285 (C.A. 2); *Reconstruction Finance Corporation* v. *Burlison,*

holding below denies the exclusive jurisdiction of the Emergency Court of Appeals to pass upon the validity of the subsidy regulation, and the order denying the subsidy to respondent, it is in square conflict with these consistent rulings. If respondent believed that it was entitled to the 80 cent subsidy on the set-aside meat, it should have contested the administrative denial and pursued its remedy in the Emergency Court of Appeals, which was always open to it.

(b) Moreover, it is clear that, on the merits, respondent was not erroneously denied the special 80-cent subsidy. This special subsidy was in addition to the basic subsidy received by all slaughterers who were complying with the various governmental restrictions on the slaughtering industry, and under Amendment 2 to Regulation No. 3 of Defense Supplies Corporation Livestock Slaughter Payments (Appendix B, *infra*, p. 41) it was payable only to a non-processing slaughterer of beef as there defined. Insofar as here pertinent, Amendment 2 defined "non-processing slaughterers" to exclude (among others) slaughterers who owned or controlled a purveyor of meat, which the Amendment further defined as one who dispensed

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171 F. 2d 329 (C.A. 5); *Atlantic Meat Co.* v. *Reconstruction Finance Corporation*, 166 F. 2d 51 (C.A. 1); *Samett* v. *Reconstruction Finance Corporation*, 165 F. 2d 605 (C.A. 10), certiorari denied, 334 U. S. 812; *Illinois Packing Co.* v. *Reconstruction Finance Corporation*, 156 F. 2d 875 (C.A. 7); *Reconstruction Finance Corporation* v. *MacArthur Mining Co.*, 184 F. 2d 913 (C.A. 8), certiorari denied, No. 481, this Term, March 5, 1951.

fresh or processed meat or meat products at wholesale or at retail.[21] And in *Armour & Co.* v. *Bowles,* 148 F. 2d 529 (E.C.A.), certiorari denied, 325 U. S. 871, the Emergency Court of Appeals, in sustaining the wholesale meat ceiling price as generally fair and equitable as to slaughterers not entitled to this special subsidy, fully approved the limited application of this subsidy. It was there pointed out that the purpose of the special subsidy was to keep in business, without raising prices, that segment of the industry, contributing about 15% of the nation's meat supply, which was being squeezed between uncontrolled livestock prices and controlled wholesale prices and which could not recoup its losses through further handling of meat. *Armour & Co.* v. *Bowles, supra* at 533-534. See, also, *Heinz* v. *Bowles,* 149 F. 2d 277 (E.C.A.), 150 F. 2d 546 (E.C.A.), certiorari denied *sub nom. E. Kahn's Sons Co.* v. *Bowles,* 326 U. S. 719; *Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation,* 155 F. 2d 525 (E.C.A.), certiorari denied, 329 U. S. 737; *Atlantic Meat Co.* v. *Reconstruction Finance Corporation,* 155 F. 2d 533 (E.C.A.), certiorari denied, 329 U. S. 737; *Greenhouse Bros. & Finkelstein, Inc.* v. *Reconstruction Finance Corporation,*

[21] The Directive of the Office of Economic Stabilization, pursuant to which Amendment 2 was issued (see *supra,* p. 10, fn. 10), provided that the special subsidy be paid to those slaughterers who "currently sell 98% or more of the total dressed carcass weight of cattle slaughtered by them in the form of carcasses, wholesale cuts, frozen boneless beef (Army specifications) (carcass equivalent) or ground beef * * *."

159 F. 2d 712 (E.C.A.), certiorari denied, 331 U. S. 812. Plainly, therefore, respondent falls within neither the letter nor the spirit of the special subsidy.[22]

Nor does the fact that respondent did not handle the set-aside meat beyond the slaughtering stage make the denial of the special subsidy erroneous as to that portion of its slaughter. It must be remembered that all slaughterers of meat, whether affiliated, processors, purveyors or independent, were subject to the requirements of the set-aside orders, and as to set-aside meat none of them was in a position to obtain the full benefits of further handling. As pointed out by the dissenting judge below (R. 40), this fact was presumably known to those who promulgated the special subsidy regulations, as well as to the Emergency Court of Appeals, which in *Armour & Co.* v. *Bowles, supra,* p. 25, sustained the wholesale meat ceiling price as generally fair and equitable at the same time that it approved the limitation of the special subsidy to a small segment of the industry. In these circumstances, it seems clear that the denial of the special subsidy to respondent does not show the "special conditions and hardships peculiarly applicable to it" (*United*

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[22] As noted, *supra,* p. 10, respondent did apply for the special subsidy on account of beef slaughtered at its Nebraska plant and its application was denied by Defense Supplies Corporation on the ground that respondent, as a purveyor of meat, was by definition ineligible for the subsidy (R. 189, 192). As stated above (p. 24), respondent did not protest the denial or take any further action to obtain the subsidy.

States v. *Commodities Trading Corp.*, 339 U. S. 121, 128), necessary to entitle it to compensation in excess of the applicable maximum price.

Finally, the record in the case reveals no ground for awarding to respondent any compensation in excess of the ceiling price, let alone an excess measured by the amount of the special subsidy. Respondent has not shown that its position was atypical in the meat industry or much less that it lost money on its overall meat operations. All it has shown is that it would have made a greater profit had it been allowed to sell the set-aside meat at retail, and that, on the basis of its own accounting system, it lost money on the portion of the meat carcasses delivered directly or indirectly to the Government. Loss of potential profits is, of course, not an exceptional circumstance. *United States* v. *Commodities Trading Corp., supra* at 128-129. Similarly, the showing of a bookkeeping loss on the portion of its operations concerned with the set-aside meat carcasses is insufficient to discharge respondent's burden of proving that it would suffer special damages by not receiving more than the ceiling price. *United States* v. *Felin & Co.*, 334 U. S. 624, 632-636, 641; cf. *Armour & Co.* v. *Bowles*, 148 F. 2d 529, 535 (E.C.A.), certiorari denied, 325 U. S. 871.[23] In any case, even

[23] That respondent probably suffered no actual loss is indicated by the fact that not only did it embark upon slaughtering operations at a time when it knew that a substantial percentage of meat it slaughtered would have to

if respondent could show an actual loss, it would provide "no sufficient basis for specially excluding [respondent] from application of the ceiling price." *United States* v. *Commodities Trading Corp., supra* at 130.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1951.

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be delivered to the Government at the ceiling price, but progressively thereafter acquired several additional slaughtering establishments—activities which respondent would presumably not have undertaken as losing propositions. Indeed, respondent showed a profit on its overall meat operations (R. 207), a circumstance which the Emergency Court of Appeals regarded as critical in sustaining as generally fair and equitable the wholesale meat ceiling price. *Armour & Co.* v. *Bowles, supra,* p. 25.

APPENDIX A

1. Food Distribution Order No. 28 (8 Fed. Reg. 2787) provided:

RESTRICTIONS ON DELIVERY OF MEAT

Pursuant to the authority vested in me by Executive Order 9280, dated December 5, 1942, and to assure an adequate supply and efficient distribution of meat to meet war and essential civilian needs, *It is hereby ordered,* As follows:

§ 1410.2 *Meat required to be set aside, allocation and restrictions on sale and delivery of—* (*a*) *Definitions.* When used in this order, unless otherwise distinctly expressed or manifestly incompatible with the intent thereof:

* * * * * *

(2) The term "reserved meat" means all meat required to be set aside and reserved pursuant to the provisions of this order.

* * * * * *

(4) The term "slaughterer" means any person who owns cattle, calves, sheep, lambs, or swine, in whole or in part, at the time they are slaughtered in an establishment having Federal inspection under the provisions of the Act of March 4, 1907, 34 Stat. 1260, as amended, 21 U. S. C. 1940 ed. 71, and as extended by Public Law 602, 77th Cong., 2d Sess., approved June 10, 1942, 56 Stat. 351.

* * * * * *

(6) The term "authorized processor" means any person who processes meat and who is under contract to sell or deliver to a governmental agency products prepared, in whole or in part, from meat, or any meat processor who is authorized by the Director to purchase reserved meat.

* * * * * *

(8) The term "governmental agency" means the Food Distribution Administration, United States Department of Agriculture (including but not restricted to the Federal Surplus Commodities Corporation), the Army, Navy, Marine Corps, and Coast Guard of the United States, the United States Maritime Commission, the War Shipping Administration, the Veterans Administration, and any other agency which the Director finds is directly essential to the war effort and which is designated by him: *Provided, however,* That post exchanges, service men's clubs, ship service stores, sales commissaries, and similar organizations shall not be deemed part of the Army, Navy, Marine Corps, or Coast Guard of the United States.

* * * * * *

(b) *Restrictions.* (1) Each slaughterer shall set aside, reserve, and hold for delivery to governmental agencies or authorized processors such quantities, types, cuts, and grades of meat during such periods of time as may be determined and specified from time to time by the Director. All such meat so set

aside, unless and until released, shall be subject to allocation by the Director among governmental agencies and authorized processors. Except as otherwise provided herein, all sales or deliveries of meat reserved pursuant to this order shall be made only in accordance with such allocations.

(2) Orders to set aside and reserve meat or orders allocating reserved meat pursuant to the provisions hereof may be made by the Director in the form of general orders or written notices to the individual slaughterers. In the absence of an allocation by the Director to or among specific governmental agencies or authorized processors, slaughterers may sell the reserved meat to any governmental agency or to any authorized processor: *Provided, however,* That no reserved meat shall be sold to any authorized processor unless such processor shall furnish a certificate in conformity with the provisions of paragraph (b) (3) hereof.

(3) Each authorized processor who purchases any reserved meat for use in fulfillment of a contract with a governmental agency shall, for each specific purchase, furnish to the slaughterer from whom he buys such reserved meat a certificate signed by an authorized official in substantially the form attached hereto as Exhibit A which shall constitute a certification to the Director that such authorized processor is familiar with the terms of this order (as originally issued or subsequently amended) and with all orders of the Director issued pursuant hereto (as they may be amended from time to time) and

that the purchase of the reserved meat has been authorized by Food Distribution Order 28, or by the Director pursuant to such order and that he will use the reserved meat purchased from the slaughterer, or an amount of meat equivalent thereto, other than reserved meat, in the fulfillment of contracts with governmental agencies. No slaughterer shall, however, be entitled to rely on any such certificate if he knows or has reasonable cause to believe it to be false.

(4) The Director may, by general orders or by written notices to individual slaughterers, give instructions with respect to the selection and to the manner of processing, cutting, and packaging of reserved meat, or he may authorize any governmental agency to issue such instructions.

(5) Notwithstanding any of the provisions hereof, the Director may at any time, by general orders or written notices, release any or all of the reserved meat whether such meat is held by slaughterers or by authorized processors. Upon receipt of notice from the Director that reserved meat is released, the slaughterer or authorized processor may dispose of the meat so released without regard to any of the restrictions contained in this order.

(6) All reserved meat shall be stored in such a manner as to maintain the quality thereof.

(7) The provisions of any order or instruction issued by the Director pursuant to the provisions hereof shall be observed without

regard to the rights of creditors, existing contracts, or payments made thereunder. No order or instruction shall, however, be construed as reducing the amount of meat which any slaughterer is required to offer or to deliver under any existing contract with any governmental agency, but any meat required to be delivered after the effective date of such order or instruction of the Director to any governmental agency pursuant to a preexisting contract may be used as a credit against the amount of meat required to be set aside and reserved pursuant to the provisions thereof.

* * * * * *

(g) *Petition for relief from hardship.* Any person affected by this order who considers that compliance herewith would work an exceptional and unreasonable hardship on him may petition the Director in writing (in triplicate) for relief, setting forth all pertinent facts and the nature of the relief sought. The Director may thereupon take such action as he deems appropriate and such action by the Director shall be final.

(h) *Violations.* Any person who wilfully violates any provision of this order or who by any act or omission falsifies records to be kept or information to be furnished pursuant to this order or who wilfully conceals a material fact concerning a matter within the scope of this order may be prohibited from receiving or making further deliveries of any material subject to allocation and such further action

may be taken against him as the Director deems appropriate, including recommendations for prosecution under section 35a of the Criminal Code (18 U. S. C. 1940 ed. 80), under paragraph 5 of section 301 of Title III of the Second War Powers Act, and under any and all other applicable laws.

* * * * * *

Issued this 5th day of March, 1943.

CLAUDE R. WICKARD,
Secretary of Agriculture.

2. Food Distribution Order No. 75 as originally issued (8 Fed. Reg. 11119) provided:

PART 1410—LIVESTOCK AND MEATS

SLAUGHTER OF LIVESTOCK AND DELIVERY OF MEAT

The fulfillment of requirements for the defense of the United States will result in a shortage in the supply of meat, meat food products, and by-products for defense, for private account, and for export; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense:

§ 1410.15 *Restrictions on the slaughter of livestock and delivery of meat*—(a) *Definitions.* When used in this order:

* * * * *

(6) The term "slaughterer" means any person who owns livestock at the time that

such livestock is killed for meat production, and includes "Class 1 slaughterer", "Class 2 slaughterer", and "Class 3 slaughterer" as herein defined.

(7) The term "Class 1 slaughterer" means any slaughterer whose establishment is operated under federal inspection.

* * * * *

(b) *Restrictions upon slaughter and delivery.* Except as otherwise provided, no person shall, either for himself or for any other person, slaughter any livestock for meat production, and no slaughterer shall deliver meat, unless he holds a valid and effective license or permit under the provisions of this order.

* * * * *

(c) *Class 1 slaughterers; licenses.* Any Class 1 slaughterer may apply to the Director for a Class 1 license.

* * * * *

(m) *Set aside requirements.* All Class 1 and Class 2 slaughterers and all processors under federal inspection shall comply with orders of the Director requiring the setting aside, reserving, holding, processing, and packaging of meat, meat products, and animal fats for delivery to such persons or agencies as the Director may prescribe.

(n) *Meat inspection.* All Class 1 and Class 2 slaughterers shall comply with orders of the Director requiring inspection, by persons designated for that purpose of their premises,

plants, livestock, carcasses, meat, meat products, and animal fats, for the purpose of determining whether the meat, meat products, or animal fats produced in such plants are sound, healthful, and fit for human consumption.

* * * * *

(s) *Petition for relief from hardship.* Any person affected by this order who considers that compliance therewith will work an exceptional and unreasonable hardship on him may, in writing, apply to the Director for relief, setting forth in such petition all pertinent facts and the nature of the relief sought. The Director may thereupon take such action as he deems appropriate, which action shall be final.

(t) *Violations.* The Director may, by suspension order, prohibit any person who violates any provision of this order from receiving, making any deliveries of, or using meat or meat products, or any other material subject to priority or allocation control by the War Food Administrator, and may recommend that any such person be prohibited from receiving, making any deliveries of, or using materials subject to the priority or allocation control of other governmental agencies. Upon a determination by the Director that any slaughterer or any person who custom slaughters has, prior to the effective date hereof, violated any provision of Food Distribution Order No. 27, as amended (*supra*), or Food Distribution Order No. 61 (8 F.R. 9108, 9275), or has subsequent to the effective date hereof

violated any provision of this order, the Director may suspend or revoke the license or permit of such person. In addition, any person who wilfully violates any provision of this order is guilty of a crime, and may be prosecuted under any or all applicable laws. Civil action may also be instituted to enforce any liability or duty created by, or to enjoin any violation of, any provision of this order.

* * * * *

Issued this 9th day of August 1943.

MARVIN JONES,
War Food Administrator.

3. Food Distribution Order No. 75-2 (8 Fed. Reg. 11325), as amended by Amendment 2 (8 Fed. Reg. 12504), provided:

§ 1410.18. *Beef required to be set aside* * * *

(b) *Quantity; processing.* Notwithstanding the provisions of Food Distribution Order 75-1 and the provisions of the order of the Director issued on September 1, 1943 (8 F.R. 12122), partially suspending certain provisions of that order, no Class 1 slaughterer shall deliver meat unless he shall:

(1) Set aside, reserve and hold for delivery to the Army, Navy, Marine Corps and Coast Guard of the United States, War Shipping Administration, and the agencies which are the subject of Food Distribution Regulation 2 (8 F.R. 7523), and subject to the provisions thereof, 45 percent of the conversion weight

of each week's production of beef obtained from the slaughter of steers and heifers, the carcasses of which meet Army specifications for carcass beef or frozen boneless beef;

(2) Bone in accordance with Army specifications for frozen boneless beef not less than 80 percent of the beef set aside, reserved and held in accordance with the requirements of paragraph (b) (1) hereof: *Provided, however,* That the Order Administrator may exempt, wholly or partially, any Class 1 slaughterer from the boning requirement provided for in this paragraph (b) (2) upon a proper showing that said slaughterer (i) does not have adequate facilities for boning, or (ii) does not have, or is unable to obtain, sufficient personnel to bone said beef, or (iii) is unable to comply with this requirement for any reason which appears to the Order Administrator to warrant such exemption.

(c) *Storage; Packaging.* Any beef, set aside and reserved in accordance with the requirements of this order until delivered shall be stored in such manner as to maintain the quality thereof. Such beef shall be prepared and packaged in accordance with Army specifications for carcass beef or frozen boneless beef.

(d) *Credits allowed on deliveries.* Deliveries of beef of the class and grade required to be set aside, may be credited against the requirements of (b) (1) or (b) (2) hereof, as follows:

(1) Carcass beef, not exceeding the amount authorized to be set aside as carcass beef under (b) (1) and (b) (2), delivered to any person

or agency enumerated in (b) (1) hereof, may be credited against the requirements of (b) (1).

(2) Boneless beef delivered to any person or agency enumerated in (b) (1) hereof, may be credited against the set aside requirements of (b) (1) and the boning requirements of (b) (2).

(3) Any beef which is stamped by a representative of the United States Army and delivered to any processor for use in the fulfillment of a contract for boneless beef with any person or agency enumerated in (b) (1) hereof, may be credited against the set aside requirements of (b) (1) and the boning requirements of (b) (2) hereof.

No credit shall be allowed for such deliveries when made to processors unless within 10 days after delivery, the slaughterer obtains a certificate signed by the processor, acknowledging receipt of the meat by him and containing the following:

The name and address of both parties;

The date or dates of delivery;

The contract number of the contract between the processor and the person or agency specified in (b) hereof; and

A statement by the processor that the beef so delivered will be or has been used in the fulfillment of such contract. The slaughterer shall endorse on such certificate the conversion weight of such beef, and shall retain the certificate for delivery to the Director upon request. All statements contained in or accom-

panying such certificates shall be deemed representations to an agency of the United States. No person shall be entitled to rely upon any such certificate if he knows or has reasonable cause to believe it to be false. (This record-keeping requirement has been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.)

(e) *Existing contracts.* The provisions of this order shall not be construed as reducing the amount of meat which any Class 1 slaughterer is required to offer or to deliver under any existing contract with the agencies named in (b) hereof, or with the Food Distribution Administration, War Food Administration, (including, but not restricted to, the Federal Surplus Commodities Corporation), the United States Maritime Commission or the Veterans' Administration; but any meat required to be delivered after the effective date of this order to such agencies pursuant to preexisting contracts other than those entered into with the Food Distribution Administration, War Food Administration, the United States Maritime Commission or the Veterans' Administration after June 11, 1943, may be used as a credit against the amount of meat required to be set aside or boned pursuant to the provisions of this order.

* * * * *

Issued this 9th day of September 1943.

C. W. KITCHEN,
Acting Director of Food Distribution.

APPENDIX B

Amendment 2 to Regulation No. 3 of Defense Supplies Corporation Livestock Slaughter Payments (9 Fed. Reg. 1820, 32 C.F.R., 1941 Supp., § 7003.14) provided:

> Pursuant to a Directive issued by the Office of Economic Stabilization on October 25, 1943 (8 F.R. 14641), Regulation No. 3 of Defense Supplies Corporation is hereby amended by adding a new Section 14, as follows:
>
> *Section 14. Extra Compensation for Non-processing Slaughterers of Beef.*
>
> (a) *Definitions.*
>
> (1) "Non-processing slaughterer of beef" means an unaffiliated slaughterer as hereinafter defined who during six consecutive months of 1942, sold, and who currently sells, 98% or more, measured in dressed carcass weight, of the total beef produced from cattle slaughtered by him in all his establishments, in the form of carcasses, wholesale cuts, boneless beef or ground beef.
>
> (2) "Unaffiliated slaughterer" means a slaughterer who does not own or control a processor or purveyor of meat, and who is not owned or controlled by a processor or purveyor of meat. "Unaffiliated slaughterer" shall not include any institution, representative or agency of Federal, State or local governments.
>
> (3) "Processor or purveyor of meat" means a person who processes fresh beef or sells or dispenses fresh or processed meat or

products containing meat, at wholesale or at retail, or in a hotel, restaurant or other eating establishment.

(4) "Own or control" means to own or control directly or indirectly a partnership equity or in excess of ten percent of any class of outstanding stock or to have made loans or advances in excess of five percent of the other person's monthly sales.

(5) "Beef" means meat derived from the carcasses of bovine animals which does not qualify as veal as defined in § 1364.470 (a)(3) of Revised Maximum Price Regulation No. 169 issued by the Office of Price Administration.

(6) "Cattle" means bovine animals, slaughter of which results in the production of beef.

(7) "Carcasses" means beef carcasses as defined in § 1364.445(a)(8) of Revised Maximum Price Regulation No. 169 issued by the Office of Price Administration.

(8) "Wholesale cuts" means beef wholesale cuts as defined in § 1364.455(a)(9) of Revised Maximum Price Regulation No. 169 issued by the Office of Price Administration.

(9) "Boneless beef" means the dressed carcass equivalent of beef covered by § 1364.452 (l), (m) and (n) of Revised Maximum Price Regulation No. 169 issued by the Office of Price Administration.

(10) "Ground beef" means the dressed carcass equivalent of ground beef as defined in § 1364.452(p)(4) of Revised Maximum Price

Regulation No. 169 issued by the Office of Price Administration.

(b) *Persons Eligible for Extra Compensation.* Any non-processing slaughterer of beef who files an application for payment under §§ 1 through 5 of this regulation may file a claim for extra compensation on account of cattle slaughtered on and after November 1, 1943, for any accounting period for which he files an application for payment under §§ 1 through 5.

(c) *Filing Claims.*

(1) Claims for extra compensation shall be filed in the same manner as, for the same period as, and with, the applications for payment provided for in §§ 1 through 5 of this regulation.

(2) If an applicant's accounting period does not begin on November 1, 1943, he may include in his claim for extra compensation for the first full accounting period beginning after November 1, 1943, the cattle slaughtered on and after November 1, 1943 and before the beginning of the next accounting period.

(d) *Payment of Claims.* Defense Supplies Corporation will make payment on approved claims for extra compensation at the rate of .8 cents a pound on the same amount of live weight of cattle slaughtered on and after November 1, 1943, on which payments are made to the applicant under §§ 1 through 5 of this regulation. Payments will be made in the

same manner and on the same terms as payments of applications under §§ 1 through 11 of this regulation.

(e) This section shall become effective as of November 1, 1943.

ISSUED this 30th day of October, 1943.

(S.) GEORGE H. HILL, JR.,
Executive Vice President.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 590

THE UNITED STATES, *Petitioner*,

v.

SAFEWAY STORES, INCORPORATED.

OPPOSITION OF SAFEWAY STORES, INCORPORATED, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

ELISHA HANSON,
ARTHUR B. HANSON,
Attorneys for
Safeway Stores, Incorporated,
729 15th Street, N. W.,
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 590

THE UNITED STATES, *Petitioner*,

v.

SAFEWAY STORES, INCORPORATED.

OPPOSITION OF SAFEWAY STORES, INCORPORATED, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Preliminary Statement.

On December 5, 1950, the United States Court of Claims rendered a decision in the case of Safeway Stores, Incorporated, v. United States of America, No. 46976, awarding to Safeway the sum of $267,779.74 as just compensation for property taken by the government to supply our armed forces during World War II.

On March 5, 1951, The United States filed a petition for writ of certiorari in this Court, No. 590, October Term, 1950, and on April 18, 1951, after the printing thereof, for-

mally served on Safeway Stores, Incorporated, copies of its petition, a copy of the transcript of record and notice of filing.

On the same day The United States filed its petition, Safeway Stores, Incorporated, filed in this Court a conditional cross petition for writ of certiorari and on April 25, 1951, after the printing thereof, copies were served on the Solicitor General. This conditional cross petition is No. 591, Supreme Court of the United States, October Term 1950.

In its cross petition Safeway prayed this Court that if it grants the petition of the United States it should grant the Cross Petition in order that all questions may be reviewed.

In the interest of brevity the statement of Matters Involved, Jurisdiction, Statutes Involved, Constitutional Provision Involved, Questions Presented, and Reasons Relied on for the Allowance of the Writ as they appear in the Conditional Cross Petition in No. 591 are incorporated herein by reference and adopted for the purpose of this Opposition.

Reasons for Denying Writ in No. 590.

The Court of Claims found that there had been a taking of Safeway's property and that pursuant to the requirement of the Fifth Amendment Safeway was entitled to just compensation in the amount of $267,779.74. While Safeway regards this sum as inadequate, nevertheless as stated in its brief in No. 591, the Court of Claims quite properly awarded this sum as a part of the measure of just compensation to which Safeway is entitled. Point 5, p. 17 of petitioner's brief in No. 591.

Therefore the only issue presented in the petition in No. 590 is whether this Court should grant a writ of certiorari on petition of the United States to review the judgment of the Court of Claims.

No Sound Reason Presented for Issuance of Writ.

No sound reason has been presented by the United States for the issuance of the writ for which it prays. Rather the petitioner has presented to this Court a novel plea for the abrogation of the requirement of the Fifth Amendment that private property shall not be taken for public use without just compensation. The novelty of this plea is to be found in petitioner's contentions.

a) that the taking was in effect not a taking but an allocation of scarce commodities for war purposes (p. 14 of petitioner's brief in No. 590).

b) that Safeway could have avoided the taking by not engaging in the production of the goods taken (pp. 17-18; 21 of petitioner's brief in No. 590), and

c) that because Safeway made an overall profit, it wasn't hurt anyway (p. 21 of petitioner's brief in No. 590).

None of these reasons advanced by the petitioner justifies the disregard of the precise requirement of the Fifth Amendment.

Conclusion.

Because of the fact that the issues are so clearly set out in the petitions and briefs filed in support thereof in Nos. 590 and 591 Safeway respectfully requests that its brief in No. 591 be incorporated herein in the interest of conserving this Court's time and that the petition in No. 590 be denied.

Respectfully submitted,

ELISHA HANSON,
ARTHUR B. HANSON,
Attorneys for
Safeway Stores, Incorporated,
729 15th Street, N. W.,
Washington 5, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 591

SAFEWAY STORES, INCORPORATED, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ELISHA HANSON,
ARTHUR B. HANSON,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 591

SAFEWAY STORES, INCORPORATED, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Safeway Stores, Incorporated, respectfully prays for the issuance of a writ of certiorari to review the decision and judgment of the United States Court of Claims rendered December 5, 1950, in the case of Safeway Stores, Incorporated, v. United States of America, No. 46976. Petitioner prays that this writ be issued only in the event that this Court grants the petition of the United States in No. 590 at this term.

The opinion and judgment of the Court of Claims was entered on the 5th day of December, 1950, and is reported at 93 F. Supp. 900. The record was settled by order of the Court of Claims on February 16, 1951. (R. 43).

A

Summary Statement of the Matters Involved

Petitioner, a Maryland corporation, at all times pertinent in this controversy, was an integrated retail food chain store organization operating more than 2300 retail food stores, including grocery and meat departments, in 23 states and the District of Columbia (R. 28).

Petitioner's usual habit of doing business was to manufacture, process or purchase commodities and distribute only through its retail stores to the ultimate consumer. At no time did petitioner operate as a wholesaler in any phase of its business (R. 28).

In 1943, petitioner was unable to supply its retail outlets with meats by purchase so it bought the Nebraska Beef Company of Omaha on June 29, 1943, and began to operate it as a division of petitioner's business on July 3, 1943 (R. 28).

At that time incident to the war effort certain controls were in force throughout the meat producing and marketing industry but no controls existed on the price of live bovine animals to the slaughterer. Such controls were not created until January 29, 1945 (R. 29).

Compliance with all the war time controls was a prerequisite to doing business (R. 29).

Prior to January 29, 1945, in an effort to keep slaughterers in business, a system of subsidies was devised. This system was designed to enable slaughterers to sell in a controlled market although their raw materials were purchased in an uncontrolled market (R. 29). Included in the system were basic subsidies paid to all slaughterers and an additional subsidy of 80 cents per hundred weight paid to non-processing slaughterers (R. 33-34).

The Nebraska Beef Company was what is known in the trade as a "non-processing slaughterer" and was pur-

chased for the purpose of supplying carcass beef to petitioner's retail stores in the Washington, D. C., and New York, N. Y., divisions (R. 29) (R. 73).

Petitioner's Nebraska Beef Company division was subject to certain Government directives entitled set aside orders which required petitioner, subject to criminal penalties for failure to do so, to set aside and hold for delivery to the United States varying percentages of all beef slaughtered each week (R. 29-30). The set aside beef was selected by government agents and had to be accounted for by petitioner to the United States before petitioner could ship any beef to its retail stores.

In accordance with these compulsory set aside orders, the petitioner did deliver to the United States 23,790,296 pounds of carcass beef, amounting to 45 per cent of its total product (R. 30).

Maximum Price Regulations numbered 169 and 355 governed sellers of meat at wholesale and retail, respectively (R. 30).

Petitioner sold all its meat other than that requisitioned by the government through its own retail stores at or below the lowest price authorized under MPR 355. Petitioner as a retailer was obligated to operate under MPR 355. It never sold any meat to anyone under MPR 169. Notwithstanding the fact that petitioner was subject to MPR 355 and not to MPR 169, the United States used MPR 169 to fix the price it paid for the beef which was set aside under its requisitions, namely, the aforementioned 23,790,296 pounds (R. 32).

Accordingly the United States paid to petitioner $5,053,-268.04 for the 23,790.296 pounds of beef taken by it. This sum included $543,321.32 basic slaughterer's subsidy which would have been paid whether or not the United States had taken the meat (R. 30-31).

This payment failed to cover petitioner's actual plant

expense at the slaughtering level by $491,412.96 on the seized beef (R. 33).

Furthermore the United States refused to pay the non-processing slaughterer's subsidy of 80 cents per hundred weight of beef slaughtered which amounted to $267,779.74 (R. 34). This subsidy was denied for the stated reason that petitioner would realize as overall profit at retail. This reasoning failed to recognize that no opportunity for such profit was available on the beef seized by the United States at the plant level (R. 192) (R. 189) (R. 34).

Petitioner could and would have sold this seized beef through its retail stores in its Washington and New York divisions and had it been permitted to do so petitioner would have realized a net minimum after costs and credits of $1,035,572.70 (R. 33). This is the amount which Petitioner would have realized by selling the seized beef in its usual habit of doing business or if the United States had paid it in accord with petitioner's method of doing business (R. 31).

More than enough red stamps were available to consumers in the Washington and New York markets for them to purchase this amount of beef from petitioner in addition to the supplies petitioner was enabled to offer in the markets.

The Court of Claims found there was a definite and unequivocal taking of petitioner's property by the United States through the enforcement of its set aside orders requiring petitioner to set aside and hold for the United States that percentage of its slaughter ordered by the United States. The Court of Claims further found that petitioner was under compulsion to deliver to the United States the beef so set aside and did so deliver it and still further that petitioner had never agreed to or consented to the price offered by the United States but on the contrary protested it and expressly reserved the right to demand and to receive all that petitioner was entitled to receive for its property so taken (R. 35-36).

On this point of what petitioner could and would have received, the Court of Claims said that the plaintiff (petitioner herein) sold 55 percent of its product in the retail market, a steak here, a roast there, to thousands of customers; whereas, the remainder of its product, 45 percent, was sold to one customer and manifestly this one customer taking nearly one half of petitioner's entire output should not have to pay the same price as the one-steak or the one-roast customer (R. 36).

Also the Court said that when petitioner entered the business it knew the United States was taking a large part of the output of all meat packers and was paying them therefor only the wholesale price and petitioner knew it would not be permitted to operate if it did not consent thereto, even though under compulsion. Therefore, it held that petitioner could claim only whatever was just compensation on the wholesale market (R. 36).

The Court of Claims then found that petitioner was entitled to just compensation in the wholesale market and after so finding awarded petitioner the amount of $267,-779.74 (R. 39). In arriving at this amount, the Court thereby denied petitioner's claim that the value of the property seized by the United States was what petitioner could and would have realized from the sale of that property in that market in which petitioner was legally bound to operate (R. 73).

In reaching its decision the Court of Claims took note of the decision of this Court in the case of the *United States* v. *Commodities Trading Corporation,* 339 U. S. 121, in which case this Court held that in the absence of exceptional circumstances ceiling prices were controlling on the subject of just compensation (R. 37). The Court of Claims further found that although petitioner was not a wholesaler it was paid the ceiling price fixed for those who sold meat wholesale but that the government in paying this price failed to compensate petitioner with the amount of the non-proces-

sors' subsidy authorized to compensate packers who did not sell byproducts for their loss at the manufacturing level. (R. 37). This latter subsidy, the Court of Claims found, was denied petitioner on the ground that it could recoup its losses through its profit on retail sales (R. 38). The Court of Claims further found that perhaps this was justified as to the meat petitioner sold at retail, but it obviously was not justified as to the meat petitioner did not sell at retail, but which was taken by the government at wholesale prices; and finally that petitioner was entitled to no less than the subsidy on the beef so taken (R. 38).

One of the judges of the Court of Claims dissented from the majority opinion, and the Chief Judge did not sit in the case (R. 39-40).

B

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review the judgment of the Court of Claims on writ of certiorari is invoked under 28 U. S. C. 1255.

C

Statutes Involved

Title 50, App. U. S. C. A. § 901 Act January 30, 1942. c. 26, 56 Stat. 23.

D

Constitutional Provision Involved

The Fifth Amendment to the Constitution of the United States.

E

Questions Presented

1. Whether in a suit for just compensation pursuant to the Fifth Amendment to the Constitution of the United

States, the Court of Claims erred in holding that compensation may be justly and fairly measured by the maximum ceiling price prescribed by the Price Administrator for wholesalers when the property taken was taken from a retailer.

2. Whether in such a suit for just compensation the Court of Claims erred in holding in effect that when the United States promulgated its requisitioning orders so as to obtain adequate supplies for our armed forces during the war effort, the United States had the power to fix the price for property taken thereunder in accordance with ceiling prices fixed for one type of business when the property was taken from one engaged in another type of business.

3. Whether the Court of Claims erred in holding that the statutes empowering the United States to fix prices authorized the United States to say what anyone must take for any property of his taken by the government for its own use.

4. Whether, in the absence of agreement between the owner and the United States as to the price to be paid by the United States for property taken by it pursuant to requisitioning orders, the United States may determine through an executive order what is just compensation for the property so taken.

5. Whether the Court of Claims erred in holding that because the United States took 45 percent of petitioner's product it was entitled to preferential treatment in the matter of price and thereby was entitled to pay an amount less than petitioner received for the balance of its product in the market where petitioner did business.

6. Whether the Court of Claims erred in holding that this case is controlled by two decisions of this Court, namely, *United States* v. *Felin and Company*, 334 U. S. 624, and *United States* v. *Commodities Trading Corporation*, 339 U. S. 121.

7. Whether the award of the Court of Claims of the amount of $267,779.74 constituted just compensated in the circumstances of this case.

8. Whether the Court of Claims erred in not allowing interest as a part of just compensation in computing its judgment in favor of petitioner.

F

Reasons Relied On for the Allowance of the Writ

If the Court should determine to grant the petition for writ of certiorari in No. 590 at this term, it would appear that the entire case should be reviewed in the light of the opinion and judgment of the Court of Claims.

The Court of Claims has decided substantial questions of federal law of general importance which have not been but which should be settled by this Court.

1. The decision of the Court of Claims that the prices established for wholesalers by the United States should be applied in measuring just compensation to a retailer is in conflict with the decision of this Court in *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343.

2. The decision of the Court of Claims, wherein it held in effect that the United States had fixed the measure of just compensation for meat taken to supply our armed forces through its procedure of licensing meat packers, fixing wholesale prices for meat packers, providing subsidies for meat packers, requiring meat packers to set aside certain percentages of their slaughter and to deliver those percentages to the United States at the prices fixed by the United States as a condition precedent to doing business, conflicts with the decisions of this Court in the cases of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *United States* v. *New River Collieries Co.*, 262 U. S. 341; and *United States* v. *Cohen Grocery Co.*, 255 U. S. 81.

3. The decision of the Court of Claims, wherein it held that the United States was entitled to preferential treatment in the matter of prices because it took 45 per cent of petitioner's product, whereas thousands of other customers took the remaining 55 per cent in small quantities, is in conflict with the decisions of this Court in the cases of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; and *United States* v. *New River Collieries Co.,* 262 U. S. 341.

4. The decision of the Court of Claims in holding that this controversy is controlled by two decisions of this Court, namely *United States* v. *Felin Co.,* 334 U. S. 624, and *United States* v. *Commodities Trading Corporation,* 339 U. S. 121, was error in that the Court failed to distinguish between the fact that in those cases both of the parties were solely and exclusively engaged in the wholesale business and the fact that in this case petitioner was solely and exclusively engaged as a retailer.

5. The award of the Court of Claims of the amount of $267,779.74 was appropriately made as a part of the measure of just compensation to which petitioner is entitled, but was wholly inadequate to put petitioner in that position it occupied in its field of doing business at the time the United States took petitioner's product under compulsion. The proper measure of just compensation was what petitioner could and would have realized in the one market available to it prevailing at the time and place of the taking, namely the retail market, not what petitioner would have realized in an entirely different market of the United States' choosing. *United States* v. *New River Collieries Co.,* 262 U. S. 341.

6. The Court of Claims erred in not allowing interest as a part of just compensation in computing its judgment in favor of the petitioner. *Boston Sand & Gravel Co.* v.

United States, 278 U. S. 41; *Jacobs* v. *United States,* 290 U. S. 13; *United States* v. *Thayer-West Point Hotel Co.,* 329 U. S. 585.

The decision of the Court of Claims in measuring just compensation in this case resulted in an award wholly inadequate under the applicable decisions of this Court and therefore should be reviewed by this Court.

Wherefore, your petitioner prays that in the event this Court grants the petition of the United States in No. 590 and issues a writ of certiorari directed to the United States Court of Claims, it should grant this conditional cross petition and issue a writ of certiorari under the seal of this Court directed to the United States Court of Claims to the end that this controversy may be reviewed in its entirety and that the judgment of said Court of Claims shall be modified so as to grant to petitioner that measure of just compensation to which it is entitled, and for such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

ELISHA HANSON,
ARTHUR B. HANSON,
Attorneys for Petitioner,
729 15th Street, N. W.,
Washington 5, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 591

SAFEWAY STORES, INCORPORATED,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The opinion below, the statement of the matter involved, jurisdiction and the questions presented appear in the Conditional Cross Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II

Summary of Argument

1. The decision of the Court of Claims that the price established for wholesalers by the United States should be applied in measuring just compensation to a retailer is in

conflict with the decision of this Court in *United States* v. *New River Collieries Co.*, 262 U. S. 341.

2. The decision of the Court of Claims, wherein it held in effect that the United States had fixed the measure of just compensation for meat taken to supply our armed forces through its procedure of licensing meat packers, fixing wholesale prices for meat packers, providing subsidies for meat packers, requiring meat packers to set aside certain percentages of their product and to deliver those percentages to the United States at prices fixed by the United States as a condition precedent to doing business, conflicts with the decisions of this Court in the case of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; and *United States* v. *New River Collieries Co.*, 262 U. S. 341.

3. The decision of the Court of Claims, wherein it held that the United States was entitled to preferential treatment in the matter of price because it took 45 percent of petitioner's product, whereas thousands of other customers took the remaining 55 percent in smaller quantities, is in conflict with the decisions of this Court in the cases of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 and *United States* v. *New River Collieries Co.*, 262 U. S. 341.

4. The decision of the Court of Claims in holding that this controversy is controlled by two decisions of this Court; namely, *United States* v. *Felin Co.*, 344 U. S. 624; and *United States* v. *Commodities Trading Corporation*, 339 U. S. 121, was error in that the Court failed to distinguish between the fact that in those cases respondents were solely and exclusively engaged in the wholesale business and the fact that in this case petitioner was solely and exclusively engaged as a retailer. (R. 28).

5. The award of the Court of Claims of the amount of $267,779.74 was appropriately made as a part of the measure

of just compensation to which petitioner is entitled, but was wholly inadequate to put petitioner in that position it occupied in its field of doing business at the time the United States took petitioner's product under compulsion.

6. The Court of Claims quite properly granted to petitioner the sum of $267,779.74 but the Court erred when it determined that this was the full measure of just compensation rather than just a part of the measure of just compensation.

7. The Court of Claims erred in not allowing interest as just compensation in computing its judgment in favor of petitioner.

III

ARGUMENT

Point 1

The decision of the Court of Claims that the price established for wholesalers by the United States should be applied in measuring just compensation to a retailer is in conflict with the decision of this Court in United States v. New River Collieries Co., 262 U. S. 341.

During the period in controversy there were two markets in which meat producers could dispose of their product. One was the wholesale market in which prices were governed by MPR 169. The other was the retail market in which prices were governed by MPR 355 (R. 30). Petitioner was a retailer and was obligated to confine its operations in sales to the retail market. It was determined both administratively and judicially that petitioner was not a wholesaler but a retailer. *Safeway Stores, Inc.* v. *Bowles,* 145 F. 2d 836; *Safeway Stores, Inc.* v. *Bowles,* 145 F. 2d 846. Cert. denied, 324 U. S. 847.

In *United States* v. *New River Collieries Co.,* 262 U. S. 341, two sets of market prices were involved. One set was for

the domestic market and the other for the foreign market. This Court rejected the lower domestic market prices as just compensation because they did not provide the monetary equivalent of the property taken by the United States or fully indemnify the owner by putting him in the same position pecuniarily that he would have been had his property not been taken. The property owner whose property was taken in the *New River* case was authorized to operate in both the domestic and the foreign markets.

Petitioner in the instant case was authorized to sell only in the retail market. Petitioner sold in no other market. The mere fact that over its protest the United States took its product and sought to pay for it at prices fixed by the United States for a market in which petitioner did not operate did not throw petitioner into that market.

POINT 2

The decision of the Court of Claims, wherein it held in effect that the United States had fixed the measure of just compensation for meat taken to supply our armed forces through its procedure of licensing meat packers, fixing wholesale prices for meat packers, providing subsidies for meat packers, requiring meat packers to set aside certain percentages of their product and to deliver those percentages to the United States at prices fixed by the United States as a condition precedent to doing business, conflicts with the decisions of this Court in the case of Monongahela Navigation Co. v. United States, 148 U. S. 312; United States v. Cohen Grocery Co., 255 U. S. 81; and United States v. New River Collieries Co., 262 U. S. 341.

In the *Monongahela Navigation* case this Court held that none of the statutes empowering the President or other executive agencies to fix prices authorized him or them finally to say what anyone must take for any property of

his wanted by the United States for its own use. In the *Cohen* case this Court held that the mere existence of a state of war could not suspend or change the guaranties and limitations of the Fifth Amendment. In the *Monongahela Navigation* case and the *New River Collieries* case it was held that in the absence of agreement between the owner and the government what is just compensation is a judicial question to be decided by the courts and not by the executive. In the instant case the Court of Claims erred in upholding the power of the United States to fix the price of products taken by it for public use when manifestly on the record the price so fixed neither compensated petitioner for the cost of manufacture nor placed it in the position it occupied when its product was taken under compulsion.

POINT 3

The decision of the Court of Claims, wherein it held that the United States was entitled to preferential treatment in the matter of price because it took 45 percent of petitioner's product, whereas thousands of other customers took the remaining 55 percent in smaller quantities, is in conflict with the decisions of this Court in the cases of Monongahela Navigation Co. v. United States, 148 U. S. 312 and United States v. New River Collieries Co., 262 U. S. 341.

There is nothing in either of these decisions or in any other decision of this Court so far as this petitioner has been able to determine that puts the United States in a preferential position simply because it takes more of a citizen's product for its own use than other persons may purchase in the available market for their use. It is submitted that because the Court of Claims made this holding this Court should pass upon it in the light of its many decisions to the effect that in the last analysis just com-

pensation simply means putting the person from whom property is taken for public use in as good a position pecuniarily as he would have been if his property had not been taken and in this instant case it is submitted that that position is the position which petitioner occupied in the retail market, not in some other market where it did not engage in business.

POINT 4

The decision of the Court of Claims in holding that this controversy is controlled by two decisions of this Court, namely, United States v. Felin Co., 344 U. S. 624; and United States v. Commodities Trading Corporation, 339 U. S. 121, was error in that the Court failed to distinguish between the fact that in those cases respondents were solely and exclusively engaged in the wholesale business and the fact that in this case petitioner was solely and exclusively engaged as a retailer.

As shown under Point 1 herein petitioner at all times during the period of this controversy was a retailer subject to Maximum Price Regulation 355. At no time was it a wholesaler subject to Maximum Price Regulation 169. Furthermore, the claim of petitioner, amply supported by evidence demonstrating that its Nebraska Beef Company Division was efficiently and effectively operated as a non-processing slaughterer, was based upon the lowest prices it was authorized to charge under MPR 355 or prices even lower than those as such lower prices prevailed in the market from time to time during the period of controversy (R. 107, 109; R. 114-116; *Safeway Shoes* v. *Bowles,* 145 F. (2d) 836, 840). The record is uncontroverted that had petitioner been able to realize what it could and would have realized in the only market where it did business the amount so realized would have been no less than $1,035,572.70 in excess of that paid by the United States for the meat taken

by the United States under its set aside orders (R. 120-126, 140).

POINT 5

The award of the Court of Claims of the amount of $267,779.74 was appropriately made as a part of the measure of just compensation to which petitioner is entitled, but was wholly inadequate to put petitioner in that position it occupied in its field of doing business at the time the United States took petitioner's product under compulsion.

The proper measure of just compensation was what petitioner could and would have realized in the one market available to it prevailing at the time and place of the taking, namely, the retail market, not what petitioner would have realized in an entirely different market of the United States' choosing. *United States* v. *New River Collieries Co.*, 262 U. S. 141.

POINT 6

The Court of Claims quite properly granted to petitioner the sum of $267,779.74, but the Court erred when it determined that this was the full measure of just compensation rather than just a part of the measure of just compensation.

As pointed out by the Court petitioner was placed in one of those exceptional circumstances referred to by this Court in the case of *United States* v. *Commodities Trading Corporation*, 339 U. S. 121. Without entering into a discussion of the question as contended by the United States that a subsidy is a grant, a bounty which the sovereign may withhold from one and give to another at will, the Court of Claims found that as a matter of fact the non-processing slaughterers subsidy was granted by the United States in order to avoid an outright increase in the ceiling price (R. 38). Nevertheless the government denied that subsidy to this petitioner because petitioner operated retail markets.

The Court of Claims said that perhaps this was justified as to the meat petitioner sold at retail because on that portion of its product it could recoup its losses through its profits from retail sales as the United States contended, but the Court further held that petitioner was entitled to no less than this subsidy on that portion of its product taken by the United States because on what the government took it manifestly could recoup no loss through sales at retail. Therefore, the Court finally held that just compensation to petitioner

> "is no less than the wholesale selling price which has been paid it plus the amount of the subsidy all other non-processing packers were paid. This puts plaintiff on a parity with all other non-processing packers whose products were taken by the government."

The amount of the subsidy denied the plaintiff but received by similar packers was $267,779.74 and this was the Court of Claims' award to petitioner.

In making this award, however, the Court failed to place petitioner in that position pecuniarily that it would have been in had its product not been taken by the government and in that respect the Court of Claims decision is in conflict with the weight of authority of this Court. See *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327; *Brown* v. *United States,* 263 U. S. 78; *Liggett & Myers Co.* v. *United States,* 274 U. S. 215; *Phelps* v. *United States,* 274 U. S. 344.

POINT 7

The Court of Claims erred in not allowing interest as just compensation in computing its judgment in favor of petitioner.

The judgment of the Court of Claims was silent on the matter of interest. Petitioner is entitled to interest not as

interest but as just compensation from the time of the taking of petitioner's property on the amount of money that represents the difference between what petitioner was paid by the United States and what petitioner is entitled to as a measure of just compensation. *Jacobs* v. *United States,* 290 U.S. 13; *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41; *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585.

Conclusion

It is respectfully submitted that for the foregoing reasons if this Court grants the petition of the United States in No. 590 it should grant this Cross Petition in order that all questions may be reviewed by this Court.

Respectfully submitted,

ELISHA HANSON,
ARTHUR B. HANSON,
729 - 15th Street, N.W.
Washington 5, D.C.
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 591

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The conditional cross-petition for certiorari in this case seeks review of the same judgment of the Court of Claims as is involved in the petition filed by the Government in *United States* v. *Safeway Stores, Incorporated,* No. 590, this Term. Petitioner, while supporting the Court of Claims' holding that there was a taking of petitioner's property under the Fifth Amendment, contends that the court below committed error in determin-

ing the amount of just compensation to which it was entitled. According to petitioner, the court should have measured just compensation by the retail ceiling price for meat rather than the lower wholesale ceiling price, and consequently that the award measured by the wholesale price plus special subsidies was inadequate.

The United States believes that these contentions are unsound. As appears in our petition in No. 590, we are of the view that there was no taking of petitioner's property. Further, even if there were a taking, petitioner would not be entitled, under the Fifth Amendment, to any compensation in addition to the wholesale ceiling price, which it had already received, since (1) in the circumstances of this case, the application of wholesale ceiling price was fair and equitable both to the petitioner and the Government, and (2) not only is the Court of Claims without jurisdiction to award, or to pass upon petitioner's entitlement to, the special subsidies, but the denial of these subsidies to petitioner did not constitute an exceptional circumstance, entitling petitioner to compensation in excess of the applicable ceiling price under the rule set out in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 128. Thus, whatever errors the court below committed, we believe, favored petitioner. However, since the issues presented by the United States and petitioner arise out of the same judgment of the Court of Claims and relate to the same

general problem, the United States does not, if its petition is granted in No. 590, oppose the review sought by the petition in this case.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY 1951.

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